IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 26, 2005 Session

# STATE OF TENNESSEE v. CHARLES A. WEBSTER

**Appeal from the Criminal Court for Davidson County**
**No. 2003-B-851 Cheryl Blackburn, Judge**

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**No. M2005-00069-CCA-R3-CD - Filed November 29, 2005**

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Pursuant to a plea agreement in the Davidson County Criminal Court, the defendant, Charles A. Webster, pleaded guilty to especially aggravated kidnappng, a Class A felony, and agreed to submit the issue of sentencing to the trial court. Aggrieved of the trial court's 20-year sentence in the Department of Correction, the defendant appeals. We affirm the judgment.

**Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed.**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Charles E. Walker, Nashville, Tennessee, for the Appellant, Charles A. Webster.

Paul G. Summers, Attorney General & Reporter; Blind Akrawi, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the Appellee, State of Tennessee.

## OPINION

In the absence of a transcript of the plea submission hearing in the appellate record, we have looked to the presentence investigative report as a basis for gleaning facts about the conviction offense. According to the report, the defendant and two accomplices detained a motorist at gunpoint, robbed the victim of personalty found on his person, and took him to a bank to withdraw cash from the victim's account. The victim was unable to effect the withdrawal from his bank's drive-through window, and the teller instructed him to present his transaction to a teller inside the bank lobby. When an attempt to withdraw cash from an automatic teller machine via the bank card found in the victim's wallet failed, the defendant and his accomplices instructed the victim to go inside the bank to withdraw the cash. The defendant accompanied the victim but waited outside the bank door. Once inside the lobby alone, the victim notified a bank teller and a security guard of the situation, and they summoned police. Hearing sirens, the defendant went to join his accomplices in

the car, but the accomplices had driven away without him. Responding police officers found the defendant hiding nearby in a truck and arrested him.

The presentence report revealed that the 21-year-old defendant had a single prior conviction of violating the driver's license law in 2002, although the report indicated that the defendant has used marijuana and cocaine. The defendant received a graduate equivalent high school degree in 2003 after being expelled from an alternative school for fighting.

In the sentencing hearing, the defendant testified that he and his co-defendants, Gary Fletcher and Harvey Webster, were riding around and that Fletcher, who had no money for buying cigarettes, confronted the victim at gunpoint and ordered him into the trio's car. When the men discovered bank cards in the victim's wallet, Harvey Webster, the defendant's cousin, suggested taking the victim into the bank for the purpose of obtaining cash, urging him, "[G]o on in, Little Cuz, just go ahead." The defendant testified that one of the co-defendant's instructed him to go inside the bank with the victim. The defendant testified, "I kind of felt pressured to go in, so I got up out of the car, because really I didn't want to be in the car anymore anyway."

The defendant denied that he had a gun when he went to the bank door with the victim. The defendant waited outside the bank door when the victim went in. He saw his cousin and Fletcher drive away and then heard a siren. The police found him hiding in a truck.

The defendant described Harvey Webster as an "aggressive" person who exerted a bad influence on the defendant, exhorting him to miss work and pressuring him into "doing things."

On cross-examination, the defendant acknowledged that, in his statement to the police, he admitted holding a gun on the victim during the initial encounter. The defendant testified that he lied in the statement. The defendant admitted that, when he was arrested, the officers found the victim's cigarettes and cell phone on his person.

The defendant's mother, Rhonda Webster, testified that, prior to moving to Nashville, the defendant had been placed in a residential treatment facility as a result of his attempted suicide. Ms. Webster testified that the defendant began suffering from depression when his grandmother passed away when the defendant was in the seventh grade. She testified that the condition worsened at the age of 18 or 19 when the defendant's father died. She stated that, after the family moved from Kentucky to Nashville, Harvey Webster "kept trying to hang around and hang around, and [she] would try to run him off" because she believed he had a bad influence on the defendant. She testified that Harvey Webster would manipulate the defendant into doing things by depicting him as a "mama's boy" if he did not comply.

Richard Watts, the boyfriend of the defendant's sister, testified that Harvey Webster "picked" at the defendant until the defendant gave in to doing what Harvey Webster wanted.

After hearing the evidence and arguments of counsel, the trial court found that the defendant's criminal history would receive only scant weight as an enhancement factor, but the court also enhanced the defendant's sentence based upon his leadership role in the commission of the offense. The court applied no mitigating factors. Specifically, the court declined to find that the defendant's role in the offense was minor, that a mental or physical condition reduced the defendant's culpability, that the defendant assisted the authorities in apprehending the offenders, or that the defendant voluntarily released the victim unharmed. The trial judge opined that sending a victim "in to get money to bring back . . . is not a voluntary release."

When there is a challenge to the length of a sentence, it is the duty of this court to conduct a *de novo* review of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely *de novo*. *Id.* If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The mechanics of arriving at an appropriate sentence are spelled out in the Criminal Sentencing Reform Act of 1989. At the conclusion of the sentencing hearing, the trial court determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b); -103(5) (2003); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

The trial court in the present case imposed a mid-range sentence of 20 years. *See* Tenn. Code Ann. § 40-35-111(b)(1) (2003) (establishing minimum sentence for Class A offense at 15 years); *id.* § 40-35-112(a)(1) (establishing sentencing Range I for Class A offenses at 15 to 25 years). "The presumptive sentence for a Class A felony shall be the midpoint of the range if there are no enhancement or mitigating factors." *Id.* § 40-35-210(c). "Should there be enhancement and mitigating factors for a Class A felony, the court must start at the midpoint of the range, enhance the sentence within the range as appropriate . . . , and then reduce the sentence within the range as appropriate . . . ." *Id.* § 40-35-210(e).

In the present case, the trial judge made appropriate reference to the principles of sentencing and expressed specific findings of fact; however, the court did not address the aptness

of mitigation factor (12), which was argued by the defense. For this reason, we are constrained to review the case *de novo* without the statutory presumption of correctness.

The court applied enhancement factor (2), that the defendant has a previous history of criminal convictions or criminal behavior in addition to that necessary to establish the range, and factor (3), that he was a leader in committing an offense involving two or more offenders. *See* Tenn. Code Ann. § 40-35-114(2), (3) (2003). The trial court gave only slight weight to factor (2), the defendant's previous history of criminal behavior.

The defendant takes no issue with the trial court's application or weighing of the enhancement factors. Rather, he posits that the trial court erred in failing to apply mitigating factor (6), that the defendant lacked substantial judgment in committing the offense because of his youth; factor (8), that the defendant suffered from a mental or physical condition that significantly reduced the defendant's culpability for the offense; factors (9) and (10), that the defendant assisted the authorities in uncovering offenses, in detecting or apprehending other offenders, or in recovering property taken during the offense; and factor (12), that the defendant acted under duress or under the domination of another person. *See id.* § 40-35-113(6), (8), (9). Additionally, the defendant presses the claim that the trial court erred in failing to mitigate the sentence based upon the following provision of the statute proscribing especially aggravated kidnapping:

> If the offender voluntarily releases the victim alive or voluntarily provides information leading to the victim's safe release, such actions shall be considered by the court as a mitigating factor at the time of sentencing.

*Id.* § 39-13-305(b)(2).

The defendant first claims that, because he was 19 years of age when he committed the conviction offense, his sentence should have been mitigated pursuant to factor (3). When determining whether the defendant lacked substantial judgment to commit the offense because of his youth, the trial court should consider "the defendant's age, education, maturity, experience, mental capacity or development, and any other pertinent circumstance tending to demonstrate the defendant's ability or inability to appreciate the nature of his conduct." *State v. Adams*, 864 S.W.2d 31, 33 (Tenn. 1993). This court has approved the rejection of mitigating factor (3) when the defendant committed the crime at 19 years of age and when no other fact was established that showed the defendant's lack of substantial judgment due to age. *See, e.g., State v. Brandon Ronald Crabtree*, No. M2002-01470-CCA-R3-CD (Tenn. Crim. App., Nashville, May 30, 2003); *State v. Marcus Tramane Green*, No. M2002-01810-CCA-R3-CD (Tenn. Crim. App., Nashville, Apr. 28, 2003); *State v. Ronald Haynes*, No. M2000-00204-CCA-R3-CD (Tenn. Crim. App., Nashville, June 1, 2001); *State v. Reginald Tyrone Donnell*, No. M1999-02184-CCA-R3-CD (Tenn. Crim. App., Nashville, Nov. 30, 2000); *State v. Mason Thomas Wilbanks*, No. 01C01-9804-CR-00184 (Tenn. Crim. App., Nashville, May 21, 1999). Although the defendant's mother testified that the defendant had been affected by the loss of family members, suffered from depression, and stayed at home most

of the time, the record evinces no basis for concluding that, because of his age, the defendant lacked substantial judgment. He had sufficient wherewithal to be gainfully employed and had acquired a graduate equivalency diploma. We discern no error in the trial court's rejection of mitigating factor (6).

The defendant articulated an engaging argument that the Tennessee Code Annotated section 39-13-305(b)(2) mitigating factor, that the offender voluntary released the especially aggravated kidnapping victim, should have been applied and given significant weight. We conclude, nevertheless, that after considering the factor as required by Code section 39-13-305(b)(2), the trial court did not err in rejecting this factor. When the defendant allowed the victim to enter the bank unaccompanied, the victim may have been effectively released, but the defendant did not voluntarily release him. As evidenced by the defendant's vigil by the bank door, he expected the victim to remain under the influence of himself and his co-defendants long enough to obtain cash and present it to him outside the bank. We discern no error in the rejection of this mitigating factor.

Next, the defendant urges the application of mitigating factor (8), that a mental or physical condition significantly reduced the defendant's culpability. The testimony in the sentencing hearing and the presentence report shows that, when living in Kentucky, the defendant was placed in residential treatment facilities at the ages of 13, 15, and 16, the latter placement resulting from the defendant's suicide attempt. The defendant's mother testified that the defendant suffered from depression brought on or exacerbated by deaths of family members. This evidence, however, came from the defendant or his mother, was anecdotal in nature, and failed to establish either a mental or physical condition present at the time of the offense or a causal relationship between such a condition and the defendant's reduced culpability for the offense. Indeed, the presentence report states that the defendant indicated no medical problems or disabilities and that he had taken no medications for mental health issues in four years. We see nothing in the record that would place the trial court in error for not applying mitigation factor (6).[1]

We also decline to disturb the trial court's failure to find that the defendant played a minor role in the commission of the offense, the factual predicate for mitigation factor (4). The trial judge pointed to the defendant's pre-plea statement that he accosted the victim with a gun, and the judge determined that, at the sentencing hearing, the defendant was minimizing his role by recanting the statement. The defendant acknowledged in the sentencing hearing that, in his pre-plea statement, he admitted using a gun. Moreover, the defendant acknowledged that he escorted the victim to the bank door. These components of evidence serve as bases for the trial court's conclusion that the defendant's role was not minor. Indeed, the evidence served as a basis for the

[1] We are aware that, in his brief, the defendant claims that a psychological report was submitted to the sentencing court as exhibit number two; however, no such report was contained in the brown exhibit envelope, which held only the presentence report (exhibit number one), and we found no psychological report elsewhere in the appellate record. On page 26 of the sentencing hearing transcript, the trial judge indicated that a psychological report was received as "Exhibit 2." We note, however, that the court reporter who certified the sentencing hearing transcript noted the filing of only one exhibit, the presentence report, and the trial court clerk's inventory of the technical record indicates that a transcript and an exhibit were filed under separate cover.

trial court applying enhancement factor (3), that the defendant was a leader in an offense involving two or more actors, which the defendant has not challenged. Thus, the record supports the trial court's rejection of mitigating factor (4).

Next, the defendant claims that the trial court erred in rejecting mitigating factors (9) and (10) regarding the defendant's cooperation in assisting the police investigation. The defendant cites his pre-plea statement in which he identified his two co-defendants. However, the defendant candidly admitted in his sentencing hearing testimony that he initially refused to identify the co-defendants, and in the hearing, he claimed that he had lied when he told the police that he held a gun during the capture of the victim. Furthermore, co-defendant Fletcher was apparently captured about the same time the defendant was arrested. The evidence of recovered property consisted of the police finding the victim's cigarettes and cell phone on the defendant when the police arrested and searched him. We are unpersuaded that the defendant offered cooperation that would merit any significant weight pursuant to factors (9) or (10).

Finally, the defendant claims that the trial court erred in not applying mitigation factor (12), that the defendant acted under duress or the domination of another person – specifically, Harvey Webster. The trial court did not address this issue in it's findings, and upon our *de novo* review, we conclude that the testimony of three witnesses illustrated a form of peer intimidation that Harvey Webster exerted over the defendant. We conclude that factor (12) should have been applied and accorded slight to moderate weight.

On the basis of applying mitigation factor (12), and on the bases of the very slight weight accorded to enhancement factor (2) and somewhat more weight accorded to enhancement factor (3), we conclude that a mid-range sentence of 20 years in the Department of Correction is justified by the record.

Although we arrive at a mid-range sentence via *de novo* review in a slightly different manner than did the trial court, we affirm the trial court's sentencing determination.

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JAMES CURWOOD WITT, JR., JUDGE